

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Thomas Odorzyński, et al. Art Unit 3688
Serial No. 10/748,715
Filed December 30, 2003
Confirmation No. 2119
For SELLING AD SPACE ON DIAPERS
Examiner Saba Dagnew

SUBSTITUTE APPEAL BRIEF

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SUBSTITUTE APPEAL BRIEF

This is a substitute appeal brief submitted to correct the Claims Appendix and to submit copies of the evidence cited in the Evidence Appendix as requested in the Notice of Non-Compliant Appeal Brief mailed August 27, 2009. The Claims Appendix has been amended to remove claim 30. The original Appeal Brief, which was filed on July 17, 2009, was from the final rejection of the claims of the above-referenced application made in the final Office action dated March 18, 2009. A Notice of Appeal was filed on June 18, 2009.

I. REAL PARTY IN INTEREST

The real party in interest in connection with the present appeal is Kimberly-Clark Worldwide, Inc. of 401 N. Lake Street, Neenah, Wisconsin 54957-0349, a corporation of the state of Delaware, owner of a 100 percent interest in the pending application.

II. RELATED APPEALS AND INTERFERENCES

Appellants are not aware of any pending appeals, which may be related to, directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1, 3-8, 10-18, 20, 22, 24-29, and 31-33 are currently pending in the application for consideration. Claims 2, 9, 19, 21, 23, and 30 were cancelled during prosecution of this application. A copy of the claims involved in this appeal appears in the Claims Appendix of this Brief.

Claims 1, 3-8, 10-18, 20, 22, 24-29, and 31-33 stand rejected. Applicants note that although claim 33 was listed as rejected on page 1 of the instant Office action, it was not specifically addressed in the "Claim Rejections" section of the instant Office action. Claim 33 was, however, addressed in the "Response to Arguments" section. As such, Applicants treat claim 33 as being rejected under Gabler and address claim 33 accordingly.

The rejections of claims 1, 3-8, 10-18, 20, 22, 24-29, and 31-33 are being appealed.

IV. STATUS OF AMENDMENTS

No amendments have been filed after the final rejection.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

With reference to the present specification, claim 1 is directed to a method of advertising, the method comprising selling space on a disposable diaper to a sponsor and placing an ad for a product other than disposable diapers onto the disposable diaper. (Page 3, lines 26-27).

Claim 8 is directed to a system for generating advertising revenue comprising a disposable diaper and an ad for products other than disposable diapers placed onto the disposable diaper. (Page 4, lines 16-18).

Claim 14 is directed to a method of promoting product purchases, the method comprising placing a promotion relating to purchasing the product onto a disposable diaper and selling the disposable diaper to a customer. (Page 4, line 27-page 5, line 1).

Claim 22 is directed to a system for promoting product purchases, the system comprising a disposable diaper and a promotion related to purchasing the product. The promotion is placed onto the disposable diaper. (Page 5, lines 18-20).

Claim 33 is directed to a method of advertising, the method comprising providing a disposable diaper, wherein the diaper comprises an absorbent pad, a bodyside liner, and a liquid impermeable backsheet; selling space on a disposable diaper to a sponsor; and placing an ad for a product other than disposable diapers onto the disposable diaper. (Page 3, lines 26-27).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Appellants appeal the rejections of Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 under 35 U.S.C. §102(b) as being unpatentable over Gabler (U.S. Patent No. 5,481,758) and the rejection of claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 under 35 U.S.C. §103(a) as being unpatentable over Gabler (U.S. Patent No. 5,481,758) in view of Iwamoto (WO 03/02496).

VII. ARGUMENT

A. Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 are submitted to be patentable over Gabler (U.S. Patent No. 5,481,758)

1. Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32

Claim 1 is directed to a method of advertising. The method comprises: selling space on a **disposable diaper** to a sponsor; and placing an ad for a product other than disposable diapers **onto the disposable diaper**.

Claim 8 is directed to a system for generating advertising revenue comprising: a **disposable diaper**; and an ad for products other than disposable diapers placed **onto the disposable diaper**.

Claim 14 is directed to a method of promoting product purchases. The method comprises: placing a promotion relating to purchasing the product **onto a disposable diaper**; and selling the disposable diaper to a customer.

Claim 22 is directed to a system for promoting product purchases. The system comprises: a **disposable diaper**; and a promotion related to purchasing the products. The promotion is placed **on the disposable diaper**.

Gabler discloses a garment that carries a message in combination with a three-dimensional structure. More particularly, Gabler discloses an article of clothing having a reproduction of paper money, which appears to be protruding from the garment, to attract the attention of a viewer, and a message to be read by the viewer in close proximity to the paper money reproduction. The articles of clothing useful in Gabler can be outer garments intended to be seen on the wearer in public, such as pocket tee shirts, button shirts, jackets, vests, pants,

shorts, and jeans, as well as articles of clothing normally seen in private, such as novelty children's sleep wear, novelty underwear such as bras, panties, boxer shorts, and night gowns.

Significantly, Gabler fails to disclose applying the paper money reproduction (or any other design or graphic) on a disposable diaper as required in Applicant's claimed invention. At best, Gabler discloses children's novelty underwear, and other novelties such as bras, panties, boxer shorts and night gowns. **No where**, however, is there any teaching of disposable diapers being included in the children's underwear. This is an important limitation of Applicant's claims 1, 8, 14, and 22, and a significant aspect of Applicant's claimed invention.

In the Response to Arguments section of the final Office action, the Office states that a "disposable diaper is a children['s] underwear." Applicant respectfully maintains his disagreement with this statement, as a disposable diaper, as required in Applicant's claimed invention, is not the same as an article of clothing such as a pocket tee shirt or underwear.

Specifically, as is well known in the art, disposable diapers are structurally different than underwear, as they typically include an absorbent pad, a bodyside liner material/liquid pervious topsheet, and a liquid impervious barrier layer/backsheet. (See, e.g., U.S. Patent Nos. 4,213,459; 6,162,961; 6,659,990; and 7,294,593). The backsheet or liquid impervious barrier layer, which is the material to which the ad or promotion will be attached, is conventionally made of a breathable film material, and in many embodiments, will have micropores to allow for improved breathability (see, U.S. Patent No. 6,659,990). As such, the outer material of the disposable diaper will have specific characteristics that the system and user of the system must keep in mind and recognize prior to placing the ad or promotion onto the disposable diaper.

Specifically, the method of adhering and/or attaching the ad or promotion to the disposable diaper in such a manner as to remain on the diaper for a sufficient time must be kept in mind. Articles of clothing or garments such as the pocket tee shirt of Gabler, or, children's underwear, are not made of breathable films and, thus, the above-mentioned considerations need not be designed around.

Further, in the Response to Arguments section of the final Office action, the Office argues that there is little, if any, patentable weight given to the type of clothing onto which the advertisements are applied. Applicant respectfully disagrees with this statement. Specifically, as noted above, the type of clothing in Gabler and the type of clothing disclosed by Applicant are structurally different, which, in turn, requires different steps of attaching an advertisement or promotion to the article. As such, the type of clothing should be given considerable patentable weight by the Office.

The Office further states in the current Office action that how the article of clothing is made or what type of material it is composed of does not affect the steps of attaching one or more ads or promotions to the article. Applicant respectfully disagrees, as noted above, the means for attachment is not necessarily the same for a cotton garment such as the pocket tee or underwear of Gabler as compared to the impervious backsheet or film of a disposable diaper as required in Applicant's claimed invention. Specifically, as known in the art, many hot melt adhesives and other specific adhering materials are necessary for adhering components of a diaper together (see, e.g., U.S. Pat. Nos. 6,657,009; RE39,307; 6,872,784; and 7,241,493), and thus would also be needed for attaching the ad or promotion to the outer layer of the disposable diaper of Applicant's claimed invention. Applicant notes that despite

raising this point in the Letter to Patent and Trademark Office dated January 13, 2009, the Office has summarily disregarded this argument in the final Office action. Specifically, instead of addressing Applicant's argument regarding the means for attachment to different types of garments, the Office has simply restated their previous point that "what types of material [the diaper] is composed of does not affect the steps of attaching one or more advertisements to the article of clothing," without offering any substantive reason why this is so.

Further, regarding Applicant's argument that a disposable diaper is not disclosed in Gabler because of the features included in a disposable diaper, the Office asserts at pages 7-8 of the final Office action that "many other articles of clothing also include one or more of these features, such as rainwear which includes liquid pervious and impervious layers to prevent the wearer from getting wet." While Applicant recognizes that this may be true, Applicant respectfully maintains that no where in Gabler is rainwear, or any of these other articles, ever mentioned, much less rainwear with Gabler's advertisement. Particularly, Gabler discloses only clothing articles including pocket tee shirts, button shirts, jackets which can be both casual jackets for personal wear and uniform jackets, vests, pants, shorts, particular jeans, novelty children's sleep wear, and novelty underwear such as bras, panties, boxer shorts, and night gowns.

Further, the Office cites to M.P.E.P. §2106.1 and states that the phrase, "diaper comprising: an absorbent pad, a bodyside liner, and a liquid impermeable backsheet," is "nonfunctional descriptive material." Applicant respectfully disagrees, as argued above, because the structure of the diaper is significant to the patentable weight of the disposable diaper. Moreover, M.P.E.P. § 2106.1, which the Office cites,

describes "functional descriptive material" to be "data structures and computer programs which impart functionality when employed as a computer component;" and, "nonfunctional descriptive material" as "music, literary works, and a compilation or mere arrangement of data." Applicants requested in the January 13, 2009 Letter to Patent Trademark Office to clarify the Office's statement regarding MPEP § 2106.01, as this section is directed to computer-related nonstatutory subject matter, however, the Office has not addressed this argument. Based on the foregoing, Gabler simply fails to disclose a method or system of placing an ad or promotion onto a disposable diaper as required in Applicant's claims 1, 8, 14, and 22.

As stated in M.P.E.P. § 2131, a claim is anticipated by a reference only if each and every element as set forth in the claim is found, either expressly or inherently described, in the cited reference. As noted above, Gabler fails to disclose each and every limitation of Applicant's claimed invention as Gabler fails to disclose or suggest placing an ad or promotion **onto a disposable diaper.** As such, claims 1, 8, 14, and 22 are novel over the Gabler reference.

Claims 3 and 6 depend directly or indirectly from claim 1, and thus are novel over the Gabler reference for the same reasons as claim 1 set forth above, as well as for the additional elements they require.

Claim 12 depends directly from claim 8, and thus is novel over the Gabler reference for the same reasons as claim 8 set forth above, as well as for the additional elements it requires.

Claims 15-17, 20, and 31 depend directly from claim 14, and thus are novel over the Gable reference for the same reasons as claim 14 set forth above, as well as for the additional elements they require.

Claims 25, 26, 28, and 32 depend directly from claim 22, and thus are novel over the Gable reference for the same reasons as claim 22 set forth above, as well as for the additional elements they require.

2. Claim 33

Claim 33 is similar to claim 1 and further requires the step of providing a disposable diaper, the diaper comprising an **absorbent pad, a bodyside liner, and a liquid impervious backsheet.**

The Office asserts at pages 8-9 of the current Office action that the phrase "diaper comprising: an absorbent pad, a bodyside liner, and a liquid impermeable backsheet" in claim 33 is nonfunctional descriptive material because it is a description of a diaper and not the step of placing an advertisement. As such, the Office concludes that no patentable weight is to be given to this limitation. Applicant respectfully disagrees. MPEP § 2143.03 states that "all words in a claim must be considered in judging the patentability of that claim against the prior art." Accordingly, as the limitations regarding the required components of the diaper on which the advertisement is to be attached are part of the body of the claim, Applicant submits that these limitations should be considered and given patentable weight. Furthermore, as noted above, Gabler fails to disclose applying the advertisement on a disposable diaper as required in Applicant's claimed invention.

Thus, claim 33 is patentable over the Gabler reference for the reasons as set forth above for claim 1, as well as for the additional limitations it requires.

B. Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 are submitted to be patentable over Gabler (U.S. Patent No. 5,481,758) in view of Iwamoto (WO 03/02496)

Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Gabler in view of Iwamoto (WO 03/028496).

Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 depend from claims 1, 8, 14, and 22, respectively, which are discussed above. Claims 1, 8, 14, and 22 are patentable over the Gabler reference for the reasons set forth above; that is, Gabler fails to teach or suggest placing an ad or promotion **onto a disposable diaper**. Iwamoto fails to overcome this shortcoming.

Specifically, Iwamoto discloses a jacket having two chest pockets, wherein the pockets have an advertisement displayed thereon. The back body of the jacket may also have an advertisement display portion, displaying a commodity, an event or the like. The advertisement(s) may be printed or embroidered directly on the jacket. Alternatively, the advertisement may be detachable from the jacket. Similar to Gabler, Iwamoto fails to teach or suggest placing an ad or promotion **onto a disposable diaper**.

Particularly, in order for the Office to show a *prima facie* case of obviousness, M.P.E.P. § 2142 requires a clear articulation of the reasons why the claimed invention would have been obvious. Specifically, the Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 82 USPQ2d 1385, 1396 (2007) noted that the burden lies initially with the Office to provide an explicit analysis supporting a rejection under 35 U.S.C. 103. "[R]ejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some **articulated reasoning** with some **rational underpinning** to support the legal conclusion of obviousness." The Court in *KSR*

International further identified a number of rationales to support a conclusion of obviousness which are consistent with the proper "functional approach" to the determination of obviousness as laid down in *Graham v. John Deere Co.* (383 U.S. 1, 148 USPQ 459 (1966)). Specifically, as previously required by the TSM (teaching, suggestion, motivation) approach to obviousness, one exemplary rationale indicated requires some teaching, suggestion, or motivation in the prior art reference that would have led one of ordinary skill to modify the prior art reference to arrive at the claimed invention. Specifically, to reject a claim based on this rationale, the Office must articulate the following: (1) a finding that there was some teaching, suggestion, or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings to arrive at each and every limitation of the claimed invention; (2) a finding that there was reasonable expectation of success; and (3) whatever additional findings based on the Graham factual inquiries may be necessary, in view of the facts of the case under consideration, to explain a conclusion of obviousness. The Office has failed to meet its burden under number (1) above, as the cited references fail to show each and every limitation of Applicant's invention and there is no apparent reason for one skilled in the art to modify/combine reference teachings to arrive at each and every limitation. It simply would not have been obvious to one skilled in the art to arrive at Applicant's claimed combinations.

Specifically, as noted above, neither cited reference teaches or suggests the method of placing an ad or promotion onto a disposable diaper. At best, the references teach placing an ad on an article of clothing such as a pocket tee shirt or

jacket. No where, however, is a disposable diaper having the features (e.g., breathable film material and/or micropores) as well known in the art even mentioned. Furthermore, no where in the cited references is the recognition of the particular requirements for placing the ad or promotion onto a breathable film material such as used on the outer layer of disposable diapers even mentioned. As such, there is simply no reason to modify the Gabler and Iwamoto references to arrive at each and every limitation of Applicant's claimed invention.

Moreover, the common sense of one ordinarily skilled in the art would not have provided a reason to modify the cited references to arrive at Applicant's disposable diaper with an ad and/or promotion placed thereon as required in claims 1, 8, 14, and 22. Specifically, as noted above, disposable diapers include materials such as breathable film materials and/or micropores that are not used in articles of clothing and, as such, why would one skilled in the art be motivated to place their ad or promotion, used on a tee shirt or jacket, onto a disposable diaper? It appears that the Office has merely used hindsight reasoning in combining these references, which has been specifically instructed against by the Federal Circuit. Based on the teachings of the cited references, there is simply no motivation to modify the cited references to arrive at Applicant's instant claims 1, 8, 14, and 22.

As the cited references fail to disclose each and every limitation of Applicant's claims 1, 8, 14, and 22 and, further, there is no motivation or suggestion to modify the references to arrive at each and every limitation of Applicant's claims, claims 1, 8, 14, and 22 are patentable over Gabler in view of Iwamoto.

Furthermore, as claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 depend directly or indirectly on claims 1, 8, 14, and 22,

respectively, claims 4, 5, 7, 10, 11, 13, 18, 24, 27, and 29 are patentable over the cited references for the same reasons as their respective independent claims set forth above, as well as for the additional elements they require.

CONCLUSION

For the reasons stated above, Appellants respectfully request that the Office's rejections be reversed and that claims 1, 3-8, 10-18, 20, 22, 24-29, and 31-33 be allowed.

Respectfully submitted,

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VIII. CLAIMS APPENDIX

1. A method of advertising, the method comprising:
selling space on a disposable diaper to a sponsor; and
placing an ad for a product other than disposable diapers
onto the disposable diaper.

3. The method of claim 1 further comprising selling the
disposable diaper to customers.

4. The method of claim 1 wherein the ad is a first ad,
the product is a first product and the sponsor is a first
sponsor, and wherein the method further comprises:
selling space on the disposable diaper to a second sponsor;
and

placing a second ad for a second product other than
disposable diapers onto the disposable diaper.

5. The method of claim 4 wherein placing the first ad
onto the disposable diaper includes placing the first ad on a
front of the disposable diaper, and placing the second ad onto
the disposable diaper includes placing the second ad on a back
of the disposable diaper.

6. The method of claim 1 wherein placing the ad onto the disposable diaper includes printing the ad onto the disposable diaper.

7. The method of claim 1 wherein placing the ad onto the disposable diaper includes affixing a detachable ad onto the disposable diaper.

8. A system for generating advertising revenue comprising:

a disposable diaper; and
an ad for products other than disposable diapers placed onto the disposable diaper.

10. The system of claim 8 wherein the disposable diaper includes a first ad on a front of the disposable diaper and a second ad on a back of the disposable diaper.

11. The system of claim 10 wherein the first ad is for a first product other than disposable diapers and the second ad is for a second product other than disposable diapers.

12. The system of claim 8 wherein the ad is printed onto the disposable diaper.

13. The system of claim 8 wherein the ad is detachable from the disposable diaper.

14. A method of promoting product purchases, the method comprising:

placing a promotion relating to purchasing the product onto a disposable diaper; and

selling the disposable diaper to a customer.

15. The method of claim 14 further comprising manufacturing the disposable diaper.

16. The method of claim 14 wherein placing a promotion onto the disposable diaper includes placing a promotion relating to purchasing disposable diapers onto the disposable diaper.

17. The method of claim 14 wherein placing a promotion onto the disposable diaper includes placing a promotion relating to purchasing a product other than disposable diapers onto the disposable diaper.

18. The method of claim 14 wherein placing a promotion onto the disposable diaper includes placing a coupon for purchasing the product onto the disposable diaper.

20. The method of claim 14 wherein placing a promotion onto the disposable diaper includes selling space on the disposable diaper to a sponsor to place the promotion onto the disposable diaper.

22. A system for promoting product purchases, the system comprising:

a disposable diaper; and
a promotion related to purchasing the product, the promotion being placed onto the disposable diaper.

24. The system of claim 22 wherein the disposable diaper includes a first promotion on a front of the disposable diaper and a second promotion on a back of the disposable diaper.

25. The system of claim 22 wherein the promotion relates to purchasing disposable diapers.

26. The system of claim 22 wherein the promotion relates to purchasing products other than disposable diapers.

27. The system of claim 22 wherein the disposable diaper includes a first promotion that is related to purchasing a product other than disposable diapers and a second promotion that is related to purchasing disposable diapers.

28. The system of claim 22 wherein the promotion is printed onto the disposable diaper.

29. The system of claim 22 wherein the promotion is detachable from the disposable diaper.

31. The method of claim 14 wherein the promotion is in the form of a code that the consumer provides to a retailer of the product to obtain a purchasing benefit.

32. The system of claim 22 wherein the promotion is in the form of a code that the consumer provides to a retailer of the product to obtain a purchasing benefit.

33. A method of advertising, the method comprising:
providing a disposable diaper, the diaper comprising: an absorbent pad, a bodyside liner, and a liquid impermeable backsheet;

selling space on a disposable diaper to a sponsor; and
placing an ad for a product other than disposable diapers
onto the disposable diaper.

IX. EVIDENCE APPENDIX

Applicants rely on the following references to support the above arguments: US Pat. No. 4,213,459; US Pat. No. 6,162,961; US Pat. No. 6,659,990; US Pat. No. 7,294,593; US Pat. No. 6,657,009; RE 39,307; US Pat. No. 6,872,784; and US Pat. No. 7,241,493. US Patent Nos. 4,213,459; 6,162,961; 6,659,990; and 7,294,593 were first cited in Applicant's Amendment A filed on March 10, 2008, and US Pat. Nos. 6,657,009; RE 39,307; 6,872,784; and 7,241,493 were first cited in Applicant's Amendment B filed on July 14, 2008. Each of Amendment A and Amendment B was considered and entered by the Office. Applicant encloses herewith copies of each of the above references as well as Applicant's Amendment A and Amendment B.

X. RELATED PROCEEDINGS APPENDIX

None.